United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7618

In The

United States Court of Appeals

For The Second Circuit

THE GOVERNMENT OF INDIA AND THE FOOD CORPORATION OF INDIA,

Plaintiffs-Appellants,

-against-

COOK INDUSTRIES, INC. AND COOK AND COMPANY,

Defendants-Appellees.

On Appeal from United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF ISSUES

Did the District Court abuse its discretion by disqualifying the law firm of Delson & Gordon and Frederick W. Meeker, an associate of that firm, from continuing to represent the plaintiffs in this action?

STATEMENT OF THE CASE

The answering brief of the defendants contained numerous distortions of the facts before the court and urged that defendants be given the right to cause the discharge of plaintiffs' chosen counsel without the benefit of any evidence to sustain their position.

In both the single claim referred to herein as the "soy bean cases" and in the present action, damages are sought for failure to deliver the quantities certified as being delivered to the respective plaintiffs at the load-ports. However, this is where the similarity ceases, and while there is a generic relationship between the cases, the cases are not "substantially related." Contrary to the assertion set forth in the footnote on pages 6 and 7 of the defendants' brief, there is a substantial factual dissimilarity between the so-called soy bean cases and the present action before the court. The present action concerns the

shipment of only wheat and sorghum in bulk from a number of ports throughout the United States of America as opposed to soy beans (A.18-32).* The purchase contract provisions, the purchasers, dates of loading and purchase, carriers and vessel are not the same in both cases (A 18-32). Only three of the 153 shipments complained about were loaded at the defendants' elevator in Reserve, Louisiana (A 18-32). The remaining 150 shipments were loaded at elevators operated by other companies to satisfy the Cook contracts (A 18-32).

Furthermore, in the soy bean cases, the inspection for quality was done not only by the Destrehan Board of Trade but was supervised by the United States Department of Agriculture in accordance with the existing simultaneous appeal procedure (381a).** No such appeal procedure was used with respect to shipments in the present action (A 18-32).

In the present action contrary to the assertion of the defendant-appellees, only three out of the 153 shipments complained about were inspected by the Destrehan Board of Trade (A 18-32). The loading procedures which may exist at Cook's sole elevator located in Reserve, Louisiana, concern only 3 out of the 153 shipments complained about. In addition, there has been no demonstration by appellees

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*All references with prefix "A" are to the Addendum to Plaintiff-appellants' Main Brief.

**All references followed by "a" refer to the Appendix.

that the loading procedures for soy beans are the same as the loading procedures for wheat or sorghum. Further, in the Soy Bean cases, the sole issue before the court was the authenticity of the certificates of weight issued by the licensees of the United States Department of Agriculture. Contrary to the present action before the court, there was never any question in the Soy Bean Cases as to the fraudulent or collusive issuance of the weight certificates (376a-379a). From the foregoing, it can be seen that the two cases are related only in the most general way and the substantial relationship urged by defendants herein is non-existent.

The full statement of Judge Stewart in the course of his decision in the soy bean cases denying Cook's motion for summary judgment was:

> "Since the primary issue in this case appears to be the weight of the soy beans when they were loaded on to the M/S NORMA, the affidavits of Messrs. Meeker and Willis are not sufficient, since they were undoubtedly not present when the soy beans were weighed and loaded." (352a)

See incomplete quote set forth on page 8 of Defendant Cook's answering brief.

Judge Stewart's statement, taken in its proper context, does not indicate that the defendants have raised a substantial issue as to the accuracy of the certificates. Rather, when one considers the procedural deficiencies

referred to by the purchasers and cited by Judge Stewart in prior portions of his decision (351a-352a), and the fact that it was Cook's burden on the motion to conclusively resolve all issues by documents, it is clear that Judge Stewart has merely indicated that the weight and grade certificates issued by the licensees of the United States Department of Agriculture were not properly authenticated (350a-352a).

The very same documents contained in the initial motion for dismissal of the complaint by Cook were incorporated in the stipulation of facts, and the previously asserted objections to their authenticity by the purchasers not mentioned (378a, 391a-398a). Judge Stewart in his decision based upon the stipulated record dismissed the complaints against Cook (446a-448a).

Much is made by the defendants of six articles which appeared in the New York Times referred to at pages "10" and "11" of the defendants-appellees' answering brief herein. The appellees have failed to set forth copies of the articles for the court to review and the court as well as plaintiffs must speculate as to their contents. The most that defendants may make of these articles is that Mr. Meeker, as well as millions of readers of the New York Times had access to such articles. No claim of confidentiality may be based thereon. Mr. Meeker under oath stated that he

was asked to obtain the articles by Mr. Reams, another attorney for Cook Industries, Inc. who practiced in Memphis, Tennessee. Mr. Meeker arranged, with the approval of Mr. O'Brien of the Hill Rivkins firm, to have a clerk obtain back issues of the New York Times although he has no recollection of having forwarded the articles to Mr. Reams (184a-185a). These articles played no role in the soy bean cases. The stipulation of facts upon which the soy bean cases were submitted to Judge Stewart is dated July 15, 1975. Back issues of the New York Times were apparently obtained on July 8, 1975 (163a and 164a). Mr. Meeker does not recall whether he even read the particular back issues. It is of great significance that even after publication of the said newspaper articles, the purchasers conceded the authenticity of the certificates of weight in question, and made no reference in the stipulation of facts to any possible fraud or collusion on the part of Cook in the issuance of such weight certificates (378a).

The references to the newspaper articles by defendant-appellees demonstrates how the court below has abused its discretion by arriving at conclusions based upon unfounded speculation. For example, Judge Ward concluded:

> "It is reasonable to assume that Mr. Meeker conducted some investigation or inquiry before deciding to obtain Mr. Willis', and not Mr. Duffy's affidavit." (203a, 209a)

The reasoning of the learned District Judge was: in view of the fact that Mr. Duffy was mentioned in an indictment by the United States against Cook, which was issued approximately one year after the execution of said stipulation of facts, Mr. Duffy's affidavit was not used (202a, 203a and 209a). Defendants emphasize at page 11 of their answering brief, however, that the said newspaper articles mention the name of the Destrehan Board of Trade "(of which Daniel X. Willis was its chief weighmaster)". Surely then if Mr. Meeker were seeking to cover anything up with respect to Cook's fraud, contrary to the suggestion of the learned District Court Judge he would not have used the affidavit of Mr. Willis. This particular incident underlines the fact that the defendants have asked the courts herein to engage in pure speculation without factual foundation.

The court below further relies upon the affidavit not based upon personal knowledge of Cook's present counsel who referred to a scrap of paper which allegedly contained the name of a Cook employee and two U.S. Department of Agriculture employees as well as certain unidentified information (161a, 203a). The defendants have kept this scrap of paper secret. It is not ascertained who the persons named are, what their duties were, what subjects were spoken about, if any, or who prepared or placed the paper in what file (203a). It is respectfully submitted that the require-

ment of secrecy covering this scrap of paper is a sham, and it cannot be believed that its contents will justify disqualification of plaintiffs' lawyers or that the secrecy claimed for it is justified.

Mr. Meeker has stated under oath that he did not conduct any investigation; nor did he gain knowledge as to the loading procedures of the defendant Cook; nor did he interview any Cook personnel at Reserve, Louisiana (58a-76a, 181a-189a). Further, there have been no facts set forth in the record to contradict the statements by Mr. Meeker. It is pointed out that no discovery conducted by the parties in the soy bean cases related to the loading procedures of Cook. Furthermore, any consultation with the attorneys for Cook related to the authenticity of the load-port documents and not to the loading procedures at the Cook elevator at Reserve, Louisiana. In addition, the consultation with the expert, Jack Berg, did not concern "shortages" but concerned the percentage of "normal shrinkage for the specific commodity [Soy Beans] and the shipment particulars..." Jack Berg was Vice President of Continental Grain Company (412a).

Mr. Meeker states as follows:

> "My discussions with Mr. Berg related solely to the shrinkage of soy beans and we did not discuss the loading procedures or any other activity of personnel of Cook." (73a)

The soy bean actions and the present action before the court are related only in the generic sense that both concern damages for the failure to deliver commodities. The type of commodity involved is different; the loading procedures for the commodities are not demonstrated to be the same; the elevators involved with the exception of three shipments are different; the inspection entities licensed by the United States Department of Agriculture with the exception of three shipments are different; and the issues involved in the cases are different both as to scope and as to nature. The soy bean cases were directed at the carrier and the sole litigated issue in the case with respect to defendant Cook Industries Inc. concerned technical and dilatory challenges to the authenticity of the weight certificates.

Mr. Meeker advises that he has no recollection of having read the six articles which appeared in the New York Times. Mr. Meeker was never consulted, and to the best of his knowledge the Hill Rivkins firm was never consulted with respect to any governmental investigations of Cook's fraud or with respect to any claims of fraudulent actions on the part of Cook.

The documents attempted to be submitted to the court in secret were submitted for the sole purpose of

creating a prejudicial atmosphere. Defendants' offer was rejected by the court. See DA 60-61, where the court below stated:

> "More importantly, the court found it unnecessary and, indeed improper, to inspect the in camera submission."

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY DISQUALIFYING FREDERICK W. MEEKER AND THE LAW FIRM OF DELSON & GORDON FROM CONTINUING TO REPRESENT PLAINTIFFS IN THIS ACTION.

There is no question that the order of disqualification of Delson & Gordon was based solely upon a determination by the court below that the soy bean cases were substantially related to the present action. Judge Ward stated:

> "The issue before this court then is whether the former and present actions against Cook are substantially related." (199a)

The court then proceeded to set forth its method of arriving at the substantial relationship as follows:

> "Thus, if Mr. Meeker might have acquired related information then the matters are substantially related and he and Delson & Gordon must be disqualified." (emphasis supplied) (200a)

The court below further refined what it believed to be the issue in the case as follows:

> "A. Are the Matters Substantially Related?
>
> Mr. Meeker and Delson and Gordon strenuously argue that although the instant action and the former actions are superficially similar inasmuch

> as they each relate to alleged shortages by Cook at its grain elevator in Reserve, Louisiana, 'in reality' they are unrelated because, they claim, the alleged shortage in the Soybean Actions was never actively litigated; consequently, Mr. Meeker did not have occasion to investigate Cook's loading procedures or conduct anything more than minimal discovery. This argument addresses the critical issue." (200a)

Thus the "critical" issue in the mind of the court below was whether or not Mr. Meeker had occasion to investigate Cook's loading procedures at Cook's elevators at Reserve, Louisiana, or conduct anything more than a minimal discovery. The court, based upon unfounded speculation, concluded that in fact Mr. Meeker conducted an investigation and engaged in something more than minimal discovery. The court, confusing the appropriate legal standard, concluded that because in its mind something might have happened therefore the two cases were substantially related, and it was beyond the power of plaintiff to prove that it did not happen.

The defendants assert that this standard, which is obviously susceptible of great abuse in application, has been approved more recently in the following three cases: Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975). Two of those three cases, Hull v. Celanese,

supra, and Emle Industries, Inc. v. Patentex, supra, were referred to and digested by Judge Moore writing for the court in Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). Judge Moore, in discussing the applicable standard for a determination as to whether or not cases are "substantially related" in the context of a disqualification motion stated as follows:

> "But as the present Chief Judge of the Second Circuit Court of Appeals noted twenty years ago in U.S. v. Standard Oil Company, 136 Fed. Supp. 345, 355 (S.D.N.Y. 1955): 'unfortunately, the cases furnish no applicable guide as to what creates a 'substantial' relationship.' The cases available at that time were cases in which the relationship was 'patently clear'.
>
> Over the intervening years the cases in which disqualification has been granted have also fallen into, or have come close to, the 'patently clear' category. A review of some of the more recent decisions is illustrated." Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d at 754.

Judge Moore then referred to Hull v. Celanese, supra, and Emle Industries, Inc. v. Patentex, Inc., supra, as examples of cases where the relationship was not substantially related but in fact were identical. Thus, in Hull, supra, Judge Tenney held:

> "Also, here the matter at issue is not merely 'substantially related' to the previous repre-

> sentation, rather, it is exactly the same litigation." 513 F.2d at 571.

In Hull, the plaintiffs' counsel was disqualified because the plaintiff previously had acted as counsel for the defendant in the same case.

With reference to Emle, supra, Judge Moore quoted Judge Kaufman:

> "[T]here are matters in controversy in each case -- both the nature and scope of control, if any, exercised by Burlington over Patentex -- that are not merely 'substantially related' but are in fact identical." 478 F.2d at 572.

In both of these cases, Hull and Emle, the respective courts quoted the "might have acquired information" test not for the purpose of establishing that the two cases were "substantially related" but merely for the purpose of indicating that once it was established that the issues in the cases were identical the lawyer must be disqualified. Were this not the fact, Judge Moore's comment in 518 F.2d at 754 that the available cases still furnish no guide as to how to determine whether cases are "substantially related" would have no meaning.

The facts in the NCK Organization, Ltd. case are also totally different from the cases before the court. The court stated the problem as follows:

> "...the question presented is whether a law firm may represent a corporate official against his former corporate employer when the firm and the client have both consulted with the former corporate house counsel on subjects at issue in the suit and the latter's testimony may bear on those issues." 542 F.2d at 130.

Thus, the issues involved concern representation with respect to an issue which concerned the same parties, the same contract and are thus in all respects identical. Thus, the court again in applying the "might have acquired information" test did not do so to determine that the matters were substantially related but it was cited to establish the presumption of the disclosure of confidences once it has been determined that the matters were identical.

In each of the cases cited by defendants, the issue is not whether the former and new matter were substantially related because in each case they were identical.

It cannot be believed that this court would subscribe to a standard which would disqualify attorneys based on sheer speculation. Such a standard is arbitrary and capricious and clearly does not constitute due process of law. Gas-a-Tron of Arizona, et al. v. Union Oil Co. of California, 534 F.2d 1322, 1325 (9th Cir. 1976).

There is no case of record in which the attorneys have been disqualified in the absence of facts in the record in support of the disqualification, either by establishing

that the issues in litigation are identical or that in fact the disqualified attorney had access to the confidences of the former client.

The facts in the record before the court do not satisfy the high standard of proof required to disqualify a firm because of the alleged participation of a junior associate.

> "The persuasiveness and detail of the proof required will thus vary inversely with the status of the lawyer in the firm in the prior litigation." Silver Chrylser Plymouth, Inc. v. Chrysler Motors Corp., 370 Fed. Supp. 581, 586, 587 (E.D.N.Y. 1973)

Furthermore, Mr. Meeker should not be required to achieve an unobtainably high standard of proof in trying to prove that he did not receive or have access to confidential information. It is often impossible to prove a negative. Silver Chrylser Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975).

It is quite obvious that it is not necessary for the defendants to establish Mr. Meeker's access to related confidences by revealing what those confidences were. In almost every case where there has been disqualification, affidavits based on personal knowledge were submitted describing the activities and subject matter of discussions had. In the present case, the defendants have refused to

submit affidavits based on personal knowledge. No satisfactory reason is given why such affidavits have not been submitted.

In any event, in camera proceedings should not be held in total secrecy. Plaintiffs' counsel should be present. The public may be excluded, of course, and the record sealed. Defendants contend that plaintiffs' counsel should be disqualified because they are already the recipient of the so-called confidential disclosures. Surely, no further harm can come from plaintiffs' counsel's participation at the hearing or review of documents. No such disclosures in fact were made as suggested. Defendants refer to an in camera presentation only to create an atmosphere of suspicion in the mind of the court.

A possible resolution of the objections of the defendants to the continued representation of Delson & Gordon as attorneys for the plaintiffs would be the segregation of Frederick W. Meeker from all matters concerning the action against Cook or any other action which may be deemed related to proceedings against Cook, thus permitting other members of the firm of Delson & Gordon, who have had no prior connection with Cook, to continue the representation. Such approach was approved by the United States Court of Claims in Kesselhaut v. U.S., 45 USLW 2569. The United

States Court of Claims permitted a firm to continue a representation with respect to an action in which possibly there would have been disqualification due to the association of a former government attorney with the firm. The court permitted the firm to continue the representation with the understanding that the former government attorney was segregated from the matter at hand. The rationale of the decision was the opinion of the Court of Claims that government attorneys would be denied access to positions in private practice with law firms if this procedure could not be used. Judge Weinstein in Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 370 Fed. Supp. 581, 589-591 (E.D.N.Y. 1973) made a similar comment in suggesting that the court avoid a disqualification policy by which young associates would become captives of large firms representing large clients in specialized areas of the law. This would result if the associates could never become associated with firms which represent interests adverse to those large clients.

The United States Court of Claims in Kesselhaut, supra, 2590 relied in part for its decision upon Opinion No. 889, Committee on Professional and Judicial Ethics, Bar Association of the City of New York, November 19, 1976, RECORD, vol. 31, pp. 552, 565.

CONCLUSION

The District Court abused its discretionary power in disqualifying Mr. Frederick W. Meeker and Delson & Gordon as counsel for plaintiffs. The judgment of the District Court should be reversed.

Dated: New York, New York
July 22, 1977

Respectfully submitted,

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